No. 154.

Brief of Atty. Gen. (Russell) for U. S. (Pl.

Office Supreme Court U. S.
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# In the Supreme Court of the United States.

OCTOBER TERM, 1898.

NORTHERN PACIFIC RAILWAY COMPANY, plaintiff in error,
v.
JAMES DE LACEY.
No. 154.

## BRIEF FOR THE UNITED STATES.

# the Supreme Court of the United States.

OCTOBER TERM, 1898.

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ORTHERN PACIFIC RAILWAY COMPANY,
plaintiff in error,
*v.*
JAMES DE LACEY.
} No. 154.

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## BRIEF FOR THE UNITED STATES.

While the title to the land involved in this contro-
rsy, unless the contention of the Railroad Company
at its title is good be correct, is and will be in the
nited States, yet the chief purpose of this brief is to
ll attention to the importance to the Government and
many others of the principle upon which the court of
peals rested its decision that the company should not
cover, viz:

That a recorded preemption claim existing at the date
the definite location of a railroad, with nothing then
record in the land office showing its cancellation or
tinguishment, conclusively precludes any possibility of
tle by the railroad company under its grant, when that
rant purports to except all lands as to which there are
reemption claims.

It does seem that this question is determined by prior
djudications of this court; but it may be well to say a

few words to point out the importance of its being set forever at rest.

As we look at it, the intent of Congress is perfectly clear from the granting acts. The language giving the boundary of the grant is sweeping, and should receive an interpretation in furtherance of an intent to accomplish a sweeping purpose. The act in the present case bounds the grant in part by saying, "lands to which the United States have *full* title, not *reserved*, sold, granted, or otherwise *appropriated*, and *free from* preemption, or *other* claims or rights."

For the land which is different from this and within certain limits a substitution is made of other lands, so that all interest of the company in questioning the character of these lands is eliminated.

The Secretary of the Interior is to proceed rapidly to issue patents for the lands, and manifestly not intended to spend a lifetime in distinguishing them. The road is all to be speedily completed, and long before it is completed, as soon as each 25 miles of it are built, he is to *confirm* to the company the title to the lands.

Whether the Government had full title, free from all claims or rights, unreserved, unappropriated, must therefore have been supposed to be something which he could rapidly determine.

And so it was. The records of his Department contained plats and records of all such free land. By his Department was kept a record of all reservations, appropriations, and dispositions of public land, and of all claims affecting public lands.

It must have been in view of these notorious facts that Congress adopted its plan of legislation. He could

see from his records whether the land was absolutely free from claims, and issue patents as speedily as might be desired.

With this plan, however, it would be utterly inconsistent to say that Congress intended an examination as to the status of the claims. "Claims or rights," Congress says, "preemption or other claims," any other claims. Such language shows that Congress was not balancing, or proposing to have the Secretary balance, the scales between a host of claimants and the company; but meant to draw a line—a boundary line—and say, never mind the status of the claims, never mind whether good or bad, never mind what the reservations or for what purpose, or the appropriations. If the title is not free from claims, free from reservations, free from appropriations, or sales, or grants, from rights whatsoever and claims whatsoever and appropriations and reservations whatsoever, then the land is not part of the land hereby intended to be granted in presenti, and the railroad company may go over to the indemnity sections to get the rest of the granted lands.

Partly to keep the public faith and partly arbitrarily, but always in sight of the Secretary with his records, Congress traced a boundary line for the grant. Along the arbitrary lines of that boundary claims good, bad, and indifferent, and whatever their status, were calls.

We say that Congress, upon good business principles, was telling the Secretary and the company, for the plat of this grant in presenti along those arbitrary lines, see the records of the Land Office.

But if this is not clearly the intent of Congress, the

alternative must be demonstrated, for every intendment is in favor of the public and against the grantee.

He who says that where there is an uncanceled claim of record the secretary was intended to determine whether in pais the preemptor had abandoned his claim, must prove it very clearly. Why that should be intended, when it is clearly not intended that the Secretary should inquire into the original invalidity of the claim, is a difficulty he must overcome at the outset. He must meet and overthrow the objection that the secretary would never know the intentions or conduct in pais of one out of a thousand of the preemption claimants at or before the definite location of a great railroad, and had no machinery for finding out. He must be able to show that Congress had in view so exceptional and occasional a matter as the lapse, by the abandonment in pais, of a preemption claim, when the existence and history of a preemption claim would naturally be expected to be evident from the records which are made under the statutes concerning such claims. He would logically be compelled to argue, or to admit, that where a man was making, in pais and without any declaration, a claim to land on which he had not settled, or a claim otherwise invalid, this should except the land, notwithstanding there was no record of any such claim. He must show that—Congress having provided a tribunal and method of proceeding by filing of record, proving of record, contesting of record, relinquishing of record, denying of record, cancelling of record—a preemption claim, a claim duly filed and of record awaiting action by the claimant or secretary, was not a matter sub judice within the intent

of Congress, which Congress intended to exclude by its comprehensive words relating to *public* lands free from claims. Does a matter cease to be sub judice the moment a plaintiff does an act which, if and when duly proven, would defeat his suit? We do not so understand the meaning of that phrase. And this court has determined that lands sub judice are not *public* lands within the meaning of such a grant. To say that this matter had ceased to be sub judice is to say that it was wholly without jurisdiction that the proceedings recited in Finding XVII took place, and to make a very rash statement concerning the methods of land office procedure with which Congress was familiar.

What Congress did not manifestly and indisputably grant it must be held not to have intended to grant. And can it be said to have manifestly and clearly, while disregarding all other matters going to the merits of claims, granted lands as to which, by some tedious controversy involving matters *in pais*, it can now be made to appear to the *courts* that the recorded claims were made by persons who, ignorant of their rights, and misinformed, happened to be omitting to press them? Was Congress manifestly and clearly legislating about future *litigation* or about a *conveyance* of its own free and unclaimed public, unreserved and unappropriated, lands?

It seems to us that Congress took pains to avoid all lands about which any question could be raised between the company and anyone else, in or out of the courts. It had, of course, no intention to grant what it no longer owned; but that was a question between it and whoever had disputed its ownership, and it evidently sought

and intended to exclude all such questions—all questionable or doubtful land—from the business in hand. For that purpose it used as strong and comprehensive language as can well be conceived of, and we submit that the courts should not hunt about for hairsplitting methods to establish a restrictive construction of that tediously comprehensive language.

The intention of the law, apparent from the law, is the law, and matters beyond its words may be within the law. The general purpose and plan of a statute are often the best guides in its interpretation. The courts should aid a sweeping clause to a sweeping effect. Congress was evidently seeking to describe lands absolutely beyond controversy, question, or doubt, so that the patenting, availability, and deduction (granting act, sec. 3) of them might be reached "as fast as may be required by the construction of the road" (sec. 6), which was intended to be very rapid. The courts should give effect to a practical and businesslike scheme and not thwart it.

We shall not go into the question of the right of Flett as distinguished from his claim. So far as we can see, his right as against the Government was established by settlement, declaration, and offer to do the rest, which the officials would not permit him to do. As between him and the Government, it seems to us that his entry was properly regarded in 1887 as good and valid and then available, by the same officials or their successors and by the Commissioner of the General Land Office. If it ever was less than that, it seems to us that (so far as the findings of fact show) it must have become so in

1886 by reason of some better right initiated in April, 1886, by the entry of DeLacey, a third party.

Whether Flett is still asserting his right and should be accorded it, it is not necessary in this ejectment proceeding to inquire; but certainly, if he had a right up to 1886, his preemption right as such excepted the land from the grant as clearly as if the land had been "sold" or "granted."

Flett's opinion in 1870, or at any other time, as to whether he had such right is a matter of no importance. If not, yet we do not know what it was at any given time from September, 1870, to September, 1887, when we find him asserting his right vigorously. He was told in September, 1870, that the railroad owned the land and that he had lost it. Whether he then believed that, or, being a poor settler, regarded a false claim by the railroad and the refusal of the land officers to let him "prove up" as equivalent to a loss of his own good title, we do not know, either. Nor are any of these things to be presumed against him in this ejectment proceeding. It is for the company to show that the land is within its grant or it can not obtain a writ of possession. The whole discussion about Flett is irrelevant for any other purpose than to throw light on the question, Has the company shown that the land is within its grant? That it must affirmatively prove, and that is the only issue in the case. The land may be De Lacey's, or Algyr's, or Flett's, or the Government's, or some one else's, or legally the Government's and equitably some one else's. The company can not get it without showing and clearly demonstrating, upon the facts

found, that Congress intended to include it in the grant to itself.

Neither shall we dwell upon the question, whether this land was, by the receipt of Flett's money and issuing of a certificate to him and recording his claim, "reserved" land. Reserved is a very broad word. Lands set apart for any of a hundred purposes—purposes which might fail or might have already failed, when the road was located—would seem to be beyond the boundary of this grant. This land was set apart by the Department for an inquiry into the original validity and subsequent prosecution of the claim of John Flett. Certainly, before the supposed abandonment, it was so set apart and was reserved. By what act, except the cancellation in 1891, did it cease to be reserved by the Department?

Nor need we contend that the land was "appropriated"—appropriated in 1869 to John Flett upon conditions as to which the company had no right to raise any question—conditions which could have been waived, so far as matters of delay and the like were concerned, by the Secretary or the board of equitable adjudication. (R. S., 2450.)

We submit that the company has wholly failed to make out such a case of clear and unmistakable grant to itself, as the law requires it to do.

Respectfully,

CHARLES W. RUSSELL,
*Assistant Attorney, Department of Justice.*

FILED
FEB 23 1899
JAMES H. McKENNEY,
Clerk

UNION PACIFIC RAILWAY CO. *v.* FRANK F. FISHER.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*

(W. V. D.) *February* 1, 1899.

The Union Pacific Railway Company has appealed from your office decision of May 15, 1897, holding that the pre-emption filing of Almon Benton excepted the NW. ¼ of the NE. ¼, Sec. 13, T. 7 S., R. 11 E., Topeka land district, Kansas, from the grant made by the act of July 1, 1862 (12 Stat. 489), and the amendment thereto of July 2, 1864 (13 Stat. 356).

This tract is within the limits of that grant and the line of road opposite thereto was definitely fixed by the map of definite location filed January 11, 1866.

The land was offered for sale under proclamation No. 636, dated March 22, 1859, under which a sale of public lands commencing September 19, 1859, was held at the Kickapoo land office. While offered for sale the tract was not sold, and thereupon took the status of offered land.

August 5, 1862, Almon Benton filed pre-emption declaratory statement embracing said tract, in which July 21, 1862, was given as the date of his settlement, but the filing was never perfected into an entry. At the date of the definite location of the line of road, this filing had not been formally canceled upon the records of the local office, and for that reason it is held in your office decision that the land covered by the filing was excepted from the grant.

The railroad company listed the tract for patent under its grant June 21, 1881, but notwithstanding this listing the local officers, without notice to the company, permitted Frank F. Fisher to make homestead entry of the tract October 7, 1896, and this entry is sustained by your office decision.

What was the status of Benton's pre-emption filing at the date of the definite location of the line of road? Was it at that time an existing pre-emption claim, within the meaning of the granting acts? If it was, the land embraced therein was excepted from the grant.

By the terms of section three of the granting act there was excepted from the grant all mineral lands and all lands "sold, reserved, or otherwise disposed of by the United States" or "to which a pre-emption or homestead claim may . . . have attached, at the time the line of said road is definitely fixed," and by section four of the amendatory act it was provided:

> . . . And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler, on any lands returned and denominated as mineral lands. . . .

The main contention of appellant is that the tract was offered land at the time of the filing thereon by Benton and that the filing had, by operation of law, wholly expired and become altogether inoperative before the definite location of the line of road and was therefore as completely extinguished as if formally cancelled.

It becomes necessary to inquire what were "offered" lands, and to ascertain the effect and status of a pre-emption filing thereon.

Originally the controlling purpose in disposing of the public lands was the obtaining of public revenue. Under the proclamation of the President and after appropriate public notice the lands were offered at public sale to the highest bidder, the minimum price being one dollar and twenty-five cents per acre, and if when so offered a tract remained unsold, it became subject to private sale under section 3 of the act of April 24, 1820 (3 Stat. 566, R. S., Sec. 2357), which provided:

> . . . and all the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry as aforesaid; . . .

As a result of this system of public and private sales, the public lands came to be spoken of as "unoffered" lands, meaning those which had not yet been exposed to public sale, and "offered" lands, meaning those which had been exposed to public sale but remained unsold. The latter, but not the former, were subject to private sale or entry at the minimum price. It will not be necessary to here refer to a class of lands the status of which has been affected by a change in the price thereof as shown in the case of Eldred *v.* Saxton (19 Wall. 189).

The pre-emption act of September 4, 1841 (5 Stat. 453, Secs. 10–15), gave a preferred right to purchase or enter, at the minimum price, not exceeding one hundred and sixty acres, or a quarter section, of public land to one who should make a personal settlement thereupon, inhabit and improve the same, and erect a dwelling-house thereon. This preferred right extended equally to unoffered and offered lands, except that by section 14 it was provided respecting unoffered lands:

> That this act shall not delay the sale of any of the public lands of the United States beyond the time which has been, or may be, appointed by the proclamation of the President, nor shall the provisions of this act be available to any person or persons who shall fail to make the proof and payment, and file the affidavit required before the day appointed for the commencement of the sales as aforesaid.

and by section 13 it was provided respecting offered lands:

> That whenever any person has settled or shall settle and improve a tract of land, subject at the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within three months after the passage of the same, and in the last within thirty days next after the date of such settlement, file with the register of the proper district a written

statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit, and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof, and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

Thus the effect of the act of 1841 was that, as to unoffered lands, the filing of a pre-emption declaratory statement was not required, but the preference right of purchase was lost unless exercised by the making of due proof and payment before the time fixed for the public sale, in which event the land would be offered and sold to the highest bidder, and if not sold would become subject to private entry by the first applicant, at the minimum price. As to offered lands, the preference right was dependent upon the filing of a declaratory statement in the local office within thirty days after the time of settlement and would be lost unless exercised by the making of due proof and payment within twelve months after the date of settlement.

Under the statute regulating sales of public lands, unoffered land could not be purchased at any price or in any manner in advance of the public sale, while offered land was at all times subject to purchase by the first applicant at a fixed price. The pre-emption act of 1841 gave to one complying with the terms thereof the privilege of purchasing unoffered land at the same fixed price at any time before the day appointed for the commencement of the public sale. This was the conferring of an entirely new privilege, but the privilege of purchasing offered lands at the fixed price was conferred by the act of April 24, 1820, and existed independently of the pre-emption law, so that as to them the only effect of the act of 1841 was to give to one complying with its terms a period of twelve months from the time of settlement within which to fully exercise his privilege and make payment for the land. This was not the conferring of an entirely new privilege, but rather the modification or enlargement of an existing one.

The act of March 3, 1843 (5 Stat. 621), supplemented the pre-emption act of 1841, and by section 5 required that settlers upon unoffered lands should file a declaratory statement in the local office within three months from the time of settlement, in default of which the tract would be awarded to the next settler in order of time who should file such statement and otherwise comply with the law, and section 9 referring to the provision respecting offered land, in section 15 of the act of 1841, to the effect that the tract would be subject to the entry of any other purchaser unless the preference right was exercised by the making of proof and payment within twelve months after the date of settlement, provided as follows:

. . . And said act shall not be so construed as to preclude any person who may have filed a notice of intention to claim any tract of land by pre-emption under said

act, from the right allowed by law to others to purchase the same by private entry *after the expiration of the right of pre-emption.*

Respecting the right or privilege secured by a pre-emption filing, the two acts of 1841 and 1843, taken together, made a difference between unoffered and offered lands in that on unoffered lands the right or privilege continued up to the commencement of the public sale whenever that might be, and if the filing had not then been perfected into an entry the land was offered at the public sale, and if not sold became subject to private entry by the first applicant, and on offered lands the right or privilege continued for twelve months from the time of settlement, and if the filing had not then been perfected into an entry, the land was likewise subject to private entry by the first applicant, the person who made the filing having the same right as others to thereafter purchase the land by private entry. The effect, however, of a failure to carry a pre-emption filing into an entry within the time prescribed by these acts was the same whether the filing embraced unoffered or offered lands, that is, the right or privilege secured by the filing terminated *ipso facto*, by operation of law, and thereafter the person who made the filing had no greater or different right or privilege of purchasing or entering the land than was possessed by others, and had no greater or different right or privilege of purchasing or entering the land than he would have possessed if he had not made the filing. If at the time of the filing the land was unoffered, he could purchase at the public sale by becoming the highest bidder, or if it remained unsold at the close of such sale he could then make private entry thereof at the minimum price upon the same terms accorded to others, but neither at the public sale nor in making such private entry would his filing avail him anything whatever. So if the land was offered land at the time of the filing, upon the expiration of the time for carrying the filing into an entry the land became subject to private entry by the person who made the filing upon the same terms that it was subject to such entry by others, but the filing would be of no advantage to him either in the presence or absence of other applicants. This result was not dependent upon the cancellation of the filing upon the records of the local office, nor was it the custom or practice of the Land Department to make a formal cancellation of such filings. The absence of a formal cancellation was therefore no indication that the officers of the Land Department recognized the expired filing as one thereafter to be prosecuted to confirmation, nor, indeed, would such recognition have been within the range of their authority.

That the "*right of pre-emption*," in the instance of offered lands, expired by operation of law with the expiration of the time for making proof and payment, and was so regarded by Congress, is fully illustrated by section 9 of the act of 1843, where it is provided that one who may have filed a pre-emption declaratory statement for offered land under the act of 1841 shall not be excluded "from the right allowed by law to others

to purchase the same by private entry after the *expiration of the right of pre-emption.*"

The fact that a filing had thus terminated and that all rights and privileges thereunder were extinguished, was as much a matter of record in the local office as would be a formal entry of cancellation, so that no inquiry into matters not shown by the records of that office was necessary in determining the status or effect of the filing. The date of settlement given in the declaratory statement, whether the filing had been perfected into an entry, whether the land was unoffered or offered at the time of the filing, and if unoffered whether it had since been exposed to public sale, were matters necessarily appearing upon the records of the local office. It follows, therefore, that under the acts of 1841 and 1843 a pre-emption filing, whether made upon unoffered or offered land, did not, after the expiration of the time for making entry thereunder, constitute even an apparent record claim to the land. The same record which gave notice of the filing gave like notice of its termination. The filing was thereafter of no advantage to the claimant which a formal cancellation would withdraw, and it was no obstacle to the disposition of the land which such a cancellation would remove.

In Union Pacific Railway Co. *v.* Hartwick (26 L. D., 680), it was held that a pre-emption filing made on unoffered lands was extinguished by operation of law, if proof and payment were not made thereunder before the day appointed for the commencement of the public sale at which such land was offered, and that a formal cancellation upon the records was not necessary to put an end to the pre-emption right.

The case under consideration is essentially different from that of a filing which has become subject to cancellation by the claimant's failure to maintain personal settlement, his ownership of 320 acres of other land, or his agreement to sell the land before entry. In such a case the claim would not be enforceable by the claimant and would be subject to cancellation upon an ascertainment of the facts, but in the absence of such ascertainment matters of this character would not appear upon the records of the local office, and would, therefore, not affect the status of the filing as an existing claim.

The status of the land at the time of the definite location of the road, January 11, 1866, constitutes the criterion by which the lands to which the company is entitled are to be determined. Van Wyck *v.* Knevals (106 U. S. 360); Kansas Pacific Ry. Co. *v.* Dunmeyer (113 U. S. 629). At that time Benton's pre-emption filing made upon offered land August 5, 1862, and based upon a settlement made July 21, 1862, had expired by operation of law, as shown by the records of the local office, and had no more effect as a claim to the land than if it had never been made. It is not claimed that Benton's settlement continued after the expiration of his filing, and up to the time of the definite location of the line of road, but this was not deemed material by your office, and is not deemed material by the Department.

Following the enactment of the homestead law, May 20, 1862, the practice of disposing of public lands at public sale was gradually abandoned, and while the authority for such sales remained, it came to be rarely exercised. As before shown, under the statutes then existing, one making a pre-emption filing upon unoffered land had until the day appointed for the public sale within which to carry his filing into an entry by making proof and payment. The abandonment, therefore, of public sales resulted in giving to those who had made pre-emption filings upon unoffered land, an unlimited or indeterminate time within which to perfect or complete their claims by making proof and payment. To correct this situation, the act of July 15, 1870 (16 Stat. 279), and the resolution of March 3, 1871 (16 Stat. 601), provided that claimants for unoffered lands should make the proper proof and payment within thirty months after the date prescribed for filing declaratory statement. (See Sec. 2267, R. S.) These additional enactments being subsequent to the definite location of the company's line of road, and being limited to unoffered lands, do not affect the case at bar, and are now mentioned only for the purpose of completing the historical statement of the legislation affecting the general subject under consideration. Any discussion of their effect upon filings upon unoffered land must be left to a case whose facts make such discussion necessary.

The views here expressed are not altogether in conflict with the decisions of the Department in the cases of Allen *v.* Northern Pacific R.R. Co. (6 L. D. 520); Schetka *v.* Northern Pacific R.R. Co. (5 L. D. 473), and Emerson *v.* Central Pacific R.R. Co. (3 L. D. 117 and 271). At the time when these decisions were rendered, the Department held that settlement, inhabitancy, and improvement constituted a pre-emption claim within the meaning of the excepting clauses of this and other similar railroad grants, and that lands so settled upon, inhabited and improved at the time of the definite location of the line of road, were excepted from the grant, although no declaratory statement had been filed or action taken in the land office, whereby a claim to the land had been asserted or recognized. The decisions cited applied this holding to the cases of persons who made pre-emption filings upon offered land and failed to make proof and payment within the time prescribed, but who, when the line of road was thereafter definitely located, were still inhabiting the land; and in support thereof it was said that "the pre-emption law bases the pre-emption right on settlement," and that "the mere fact that the pre-emptor's filing had lapsed is not sufficient evidence of the abandonment of his claim." That which was thus held to except the land from the grant was the settlement and not the expired filing. In the Schetka case a filing was made upon offered land by one Barth, and the time for making proof and payment thereunder expired before the definite location of the line of road. It was held: "If the settlement existed at the time of the definite location, the claim of the company is at an end. If, however, the claim of Barth to the

land had ceased at that date, I see no reason from this record why the tract should not be awarded to the company." In the Allen case, a filing upon offered land, made by one Fittler, had expired before definite location, and the decision, calling attention to the absence of an allegation that the original claimant continued to hold the land at the time of the definite location of the road, ordered a hearing to ascertain the facts in that connection, and held that "if the land was at that date free from the settlement claim of Fittler, aforesaid, I see no reason from the present record why the railroad company should not get the land." These were, in effect, decisions that an expired filing upon offered land, although not formally cancelled upon the records of the local land office, did not constitute such a pre-emption claim as excepted the land from the grant, for clearly there was no occasion to inquire whether personal settlement or inhabitancy had been maintained up to the time of the definite location of the line of road, if the filing itself, although expired, defeated the grant. That this is the proper interpretation of these decisions is shown by the subsequent cases of Northern Pacific R.R. Co. *v.* Stovenour (10 L. D. 645) and Meister *v.* St. Paul, Minneapolis and Manitoba Ry. Co. *et al.* (14 L. D. 624). In the Stovenour case, which involved unoffered land, it was said:

This conclusion renders it necessary further to consider whether the land was "free from pre-emption, or other claims or rights," at the date when the line of the company's road was definitely located, to wit: July 6, 1882. At that date, it will be observed, the time prescribed by statute, within which proof and payment were required to be made under the declaratory statements of Pare and Yeaman, had elapsed without proof and payment having been made. These declaratory statements were, therefore, at the date when the company's rights attached under its grant, what are usually denominated "expired filings;" and there is no evidence, or allegation, even, that the parties named were then settlers, or residents on the land.

Were those filings, nevertheless, "pre-emption claims," such as served to except the land from the grant? I am of the opinion that they were not. Upon the expiration of the time limited by statute for the making of proof and payment, without such proof and payment having been made, the presumption arose that whatever claim, or claims, had previously attached to the land, under or by reason of such filings, had been abandoned, and no longer in fact existed. This presumption, however, was not conclusive, but was open to rebuttal by any one claiming an interest in or right to the land, who might allege the contrary. The claimant, Stovenour, has made no such allegation in this case. So far as the record shows, the land in dispute was *prima facie* subject to the grant to the company at the date of the definite location of its road, and must be held, therefore, in the absence of any allegation or showing to the contrary, to have passed under the grant.

In the Meister case, which involved offered land, it was said:

Said land was offered at public sale October 26, 1864. On July 8, 1869, Garrett Cronk filed pre-emption declaratory statement (No. 81) for said tract and others, alleging settlement July 3, 1869, but never attempted to perfect title under said filing.

You affirmed the decision of the local officers on the ground that Cronk's filing expired before the attachment of rights under said grant, and that said land therefore inured to said grant.

On appeal to this Department, Meister alleges error in rejecting his application on such ground. Under the pre-emption law (Sec. 2264 of the Revised Statutes) it was necessary for Cronk, within twelve months after the date of his settlement, to "make the proof, affidavit, and payment" required, and upon failure thereof said land became "subject to the entry of any other purchaser." Cronk never complied with this provision of the law. The twelve months from his settlement expired July 5, 1870, and said tract then became *prima facie* vacant public land, and subject to the grant of the company at the date of the definite location of its road on December 19, 1871, and must be held to have passed under its grant in the absence of any showing to the contrary.

The holding of the Department upon which all these decisions seem to have been predicated, viz., that settlement, or settlement followed by inhabitancy and improvement, constitutes a pre-emption claim with the excepting clauses found in this and similar grants to aid in the construction of railroads, has given way to subsequent rulings of the Supreme Court fully establishing what is a pre-emption or homestead claim within the meaning of these granting acts. The court's rulings are here given in its own language.

In Kansas Pacific *v.* Dunmeyer (113 U. S. 629, 640, 644) it is said:

The land granted by Congress was from its very character and surroundings uncertain in many respects, until the thing was done which should remove that uncertainty, and give precision to the grant. Wherever the road might go, the grant was limited originally to five sections, and, by the amendment of 1864, to ten sections on each side of it within the limit of twenty miles. These were to be odd-numbered sections, so that the even-numbered sections did not pass by the grant. And these odd-numbered sections were to be those "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead right had not attached at the time the line of said road is definitely fixed." When the line was fixed, which we have already said was by the act of filing this map of definite location in the General Land Office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had then been made. Where they had not been made, this determination was only postponed until the survey should have been made. This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted. The express and unequivocal language of the statute is that the odd sections *not* in this condition are granted. The grant is limited, by its clear meaning, to the other odd sections, and not to these.

. . . . . .

In the case before us a claim was made and filed in the land office, and there recognized, before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of Congress this homestead claim had *attached* to the land, and it therefore did not pass by the grant.

Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if, in a deed, it had been excluded from the conveyance by metes and bounds.

The Dunmeyer decision is cited with approval in Dakota Railroad Co. *v.* Whitney (132 U. S. 357), and Whitney *v.* Taylor (158 U. S. 85). In the latter it is said at page 93:

With reference to the first of these reasons it is true that there must be a settlement and improvement in order to justify the filing of such a declaratory statement. Settlement is the initial fact. The act of September 4, 1841, c. 16, 5 Stat. 453, which was in force at the time of these transactions, gave the right of pre-emption to one making "a settlement in person," and who inhabits and improves the land and erects a dwelling thereon (§ 10), and authorized the filing of a declaratory statement within three months after the date of such settlement. (§ 15.) In this respect a pre-emption differs from a homestead, for the entry in the land office is in respect to the latter the initial fact. Act of May 20, 1862, c. 75, 12 Stat. 392; Rev. Stat. § 2290; Maddox *v.* Burnham, 156 U. S. 544. But it is also true that settlement alone without a declaratory statement creates no pre-emption right. "Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose." Lansdale *v.* Daniels, 100 U. S. 113, 116. And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the pre-emption claim. While the cases of Kansas Pacific Railway Co. *v.* Dunmeyer, and Hastings & Dakota Railway Co. *v.* Whitney, *supra*, involved simply homestead claims, yet, in the opinion in each, pre-emption and homestead claims were mentioned and considered as standing in this respect upon the same footing. Further, it may be noticed that the granting clause of the Pacific Railroad acts, differing from similar clauses in other railroad grants, excepts lands to which pre-emption or homestead "claims" have attached, instead of simply cases of pre-emption or homestead "rights." And the filing of this declaratory statement was, in the strictest sense of the term, the assertion of a pre-emption claim, and when filed and noted it was officially recognized as such.

In Northern Pacific Railroad Co. *v.* Colburn (164 U. S. 383, 386, 388), it is said:

But frequent decisions of this court have been to the effect that no pre-emption or homestead claim attaches to a tract until an entry in the local land office. Thus, in the case of Kansas Pacific Railroad *v.* Dunmeyer, 113 U. S., 629, 644, Mr. Justice Miller, speaking for the court, said:

"Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation."

This language was quoted and the decision reaffirmed in Hastings & Dakota Railroad *v.* Whitney, 132 U. S., 357; Whitney *v.* Taylor, 158 U. S., 85. In Lansdale *v.*

Daniels, 100 U. S., 113, 116, it was ruled that "such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose." See, also, Maddox *v.* Burnham, 156 U. S., 544. Now, in this case the allegations are that Kelly never made any entry in the local land office, and the decision of the Secretary of the Interior is based simply on the fact of occupation and cultivation. And while the decision of that fact may be conclusive between the parties, his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties, and which is open to review in the courts.

. . . . . .

For the reasons above indicated, because the decision of the Land Department was only on matters of fact and did not conclude the law of the case, and because such facts so found were not of themselves sufficient to disturb the title of the railroad company, the judgment is reversed. . . .

In this connection see Wight *v.* Central Pacific R.R. Co. (27 L. D., 182) and Central Pacific R.R. Co. *v.* Hunsaker (27 L. D., 297).

After a careful examination of the statutes and of judicial and Departmental decisions, it is held that an expired pre-emption filing upon offered land is not an existing or subsisting claim upon the records of the local land office, and does not constitute a pre-emption or other lawful claim within the meaning of the excepting clauses of the grant here under consideration.

In some Departmental decisions, expressions are found attributing to the case of Whitney *v.* Taylor, *supra*, a conclusion different from that here announced. (See Fish *v.* Northern Pacific R.R. Co., 21 L. D. 165; 23 L. D. 15.) Without giving any consideration to whether the land in question was offered or unoffered, or whether a filing upon offered land, shown by the records of the local land office to have expired by operation of law, is any more an existing or subsisting record claim than one shown by those records to have been canceled or set aside for matters *de hors* the record, these decisions quoted, and give special force to, the following extract from the opinion in that case:

. . . when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the Government and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this, notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the Government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard. . . .

. . . Jones had filed a claim in respect to this land, declaring that he had settled and improved it, and intended to purchase it under the provisions of the pre-emption law. Whether he had in fact settled or improved it was a question in which the Government was, at least up to the time of the filing of the map of definite location, the only party adversely interested. And if it was content to let that claim rest as one

thereafter to be prosecuted to consummation, that was the end of the matter, and the railroad company was not permitted by the filing of its map of definite location to become a party to any such controversy. . . .

That case involved the effect of an unexpired pre-emption filing upon unoffered land existing upon the records of the local office at the time of the definite location of the company's line of road, March 26, 1864. It was charged by the company that the claimant had not made settlement upon the land, or that if such a settlement had been made the claim had been abandoned before the definite location of the line of road. A consideration of the entire decision seems to indicate that what was said in the extract quoted above was in response to this charge. It was also charged that the filing was not followed by payment and final proof within the time prescribed, and that at the date of the definite location of the company's line of road the filing had become, in the nomenclature of the land office, an expired filing, and the land had become thereby discharged of all claim by reason thereof. In response to this charge the court, quoting from the decision of the Secretary of the Interior thereon, said:

It thus appears that the tract in question remained in the category of unoffered lands, and was not proclaimed for sale. The pre-emption act of March 3, 1843 (5 Stat., 620), provided that the settler on unoffered land might make proof and payment at any time before the commencement of the public sale, which should embrace his land. Until such time arrived the filing protected the claim of the settler. This was the status of the law at the time said company's rights attached, and it so continued until modified by the act of July 14, 1870. (16 Stat., 279.)

That this decision upon the effect of an unexpired filing upon unoffered land is not a decision upon the effect of an expired filing upon offered land is manifest, and that the court does not consider that the status of an expired filing was thereby determined seems probable in view of the subsequent decision in Northern Pacific Railroad Company *v.* Colburn (164 U. S., 383, 388), where the court says:

There are other questions in this case, such as the significance of an "expired filing," . . . But as none of these matters were considered by the Supreme Court of the State, and are not noticed by counsel for defendant in error, we deem it unwise to make any observations thereon, leaving them for consideration in the future progress of the case.

The decision of your office is reversed, and the entry of Fisher is ordered cancelled. Herewith are the papers.

# OPINION

Statement of the Case.

# NORTHERN PACIFIC RAILWAY COMPANY *v.* DE LACEY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 154. Argued and submitted January 18, 1899. — Decided May 22, 1899.

The right of Flett, under whom De Lacey claims, was a right of preëmption only, which ceased at the expiration of thirty months from the filing of its statement, by reason of the failure to make proof and payment within the time required by law, and it is not necessary, in order that the law shall have its full operation, that an acknowledgment of the fact should be made by an officer in the land office, in order to permit the law of Congress to have its legal effect; and when the defendant settled upon the land in April, 1886, and applied to make a homestead entry thereon, his application was rightfully rejected.

The record shows that at the time of the commencement of this action the railway company was the owner and entitled to the immediate possession of the land in controversy, and that it was entitled therefore to judgment in its favor.

THIS is an action of ejectment brought by the plaintiff in error against the defendant to recover possession of 160 acres of land situated not far from Tacoma in the State of Washington.

The land lies within the primary limits of the land grant both of the main line of the railroad of plaintiff in error, as definitely located between Portland and Puget Sound, and the Cascade branch, as definitely located between the point where the railroad leaves the main line and crosses the Cascade Mountains to Puget Sound.

It appears from the facts found upon the trial, without a jury, that the plaintiff's predecessor was incorporated under the act of Congress of July 2, 1864, c. 217, 13 Stat. 365, and received a grant of public lands by virtue of section 3 of that act. A further grant was made by virtue of the joint resolution of Congress, adopted May 31, 1870. 16 Stat. 378, Resolution No. 67.

The company surveyed and definitely located the line of its

branch road extending from Tacoma to South Prairie, and on March 26, 1884, filed its map, showing such line of definite location, in the office of the Commissioner of the General Land Office. The land in controversy is within the limits of the grant to the company as defined by this map of definite location, and is within the limits of the grant under the act of July 2, 1864.

The following statement is taken from the finding of facts by the trial judge:

"XII. April 9, 1869, one John Flett filed declaratory statement No. 1227, declaring his intention to purchase certain lands which are described in the complaint, under the laws of the United States authorizing the preëmption of unoffered lands. Whether or not Flett was at this time qualified to enter the land under the preëmption or homestead laws does not appear.

"XIII. In the fall of 1869 Flett left the land in controversy and did not thereafter reside thereon, although it is recited in the decision of the Secretary of the Interior in a contest between the railroad company, De Lacey, Flett, et al., before the Interior Department, involving the land here in controversy, that in September, 1870, Flett went to the local land office and told the officers that he had come to prove up on his claim; that they told him it was railroad land and that he had lost it; that Flett did not then actually offer to make proof, but acquiesced in the advice of the local officers that he was not entitled to submit proof under his filing."

"XV. The defendant, James De Lacey, settled upon the land in controversy in April, 1886. April 5, 1886, he applied to make homestead entry thereon. His application was rejected for the reason that the land fell within the limits of the grant to the railroad company on both main and branch lines. From this decision by the register and receiver De Lacey appealed to the Commissioner of the General Land Office.

"XVI. September 7, 1887, John Flett submitted proof in support of his preëmption claim, founded upon his declaratory statement filed April 9, 1869.

Statement of the Case.

"XVII. Afterward, under the instructions of the Commissioner, a hearing was had, at which all the parties, the railroad company, James De Lacey, John Algyr and John Flett were present. July 27, 1889, the receiver of the district land office found that Flett had not voluntarily abandoned the land in 1869, and that his entry should be reinstated. From this finding all the parties but Flett appealed to the Commissioner of the General Land Office, and December 5, 1889, the Commissioner sustained the finding of the receiver. Thereafter the other parties to the contest appealed to the Secretary of the Interior. September 28, 1891, the Secretary of the Interior reversed the ruling of the Commissioner of the General Land Office, and awarded the land in controversy to the railroad company.

"December 13, 1892, letters patent of the United States, regular in form, were issued, conveying the land in controversy to the plaintiff."

"XIX. Flett's declaratory statement was not formally cancelled upon the records until December 23, 1891.

"XX. The defendant is in possession of the land and withholds such possession from the plaintiff."

It also appeared that the railroad company on May 10, 1879, transmitted to the office of the Secretary of the Interior a map showing its relocated line of general route, which map was on June 11, 1879, sent to the Commissioner of the General Land Office by the Secretary for filing, with instructions to withdraw the lands coterminous therewith from sale, preemption or entry for the benefit of the railroad company, and the map was duly filed on that day. The land in controversy is within the line as relocated.

The conclusions of law of the Circuit Court were in favor of the railroad company, and the court held that prior to June 11, 1879, when the map of general route as relocated was filed, and after the abandonment of the land by John Flett, the same was public land of the United States, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, and that from that date (June 11, 1879) the land was reserved from sale,

Counsel for Parties.

preëmption or entry, except by the railroad company, by virtue of fixing the line of general route of the branch line coterminous therewith; that this reservation became effective from and after the receipt of the order of the Commissioner at the United States district land office on July 19, 1879.

Judgment in favor of the plaintiff for the recovery of the possession of the land was duly entered. Upon appeal by the defendant to the Circuit Court of Appeals for the Ninth Circuit, that court reversed the judgment and remanded the cause to the Circuit Court for further proceedings not inconsistent with the views expressed in the opinion of the Court of Appeals. Judgment in accordance with the opinion of that court was subsequently entered by the Circuit Court, dismissing the plaintiff's complaint, and awarding costs to the defendant. This was done under objection of plaintiff, which claimed the right to a new trial, and exception was taken thereto.

It appearing that the plaintiff, the Northern Pacific Railway Company, had subsequently to the hearing acquired the rights of the original plaintiff to the property described in the complaint, it was substituted as plaintiff in this action. A writ of error was then taken to the United States Circuit Court of Appeals for the Ninth Circuit, where the judgment of the Circuit Court was affirmed. The plaintiff by writ of error brought the case here for review.

The opinion of the Circuit Judge, given upon the trial of the cause, is reported in 66 Fed. Rep. 450, and that of the Circuit Court of Appeals in 44 U. S. App. 257.

*Mr. C. W. Bunn* for plaintiff in error. *Mr. James B. Kerr* was on his brief.

*Mr. W. H. Pritchard* for defendant in error submitted on his brief.

*Mr. Solicitor General* and *Mr. Assistant Attorney Russell* for the United States submitted on their brief.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The grant of lands to aid the construction of that portion of the main line of the railroad of the plaintiff in error, between Portland and Puget Sound, dates from the joint resolution of May 31, 1870, and prior to that time there was no land grant in aid of the construction of that portion of the road. *United States* v. *Northern Pacific Railroad Company*, 152 U. S. 284, 292.

At the time of the adoption of the resolution of 1870 there had been filed, April 9, 1869, in the local land office the statement of John Flett, declaring his intention to purchase the lands in dispute under the laws of the United States authorizing the preëmption of unoffered lands, and that entry being unforfeited and uncancelled, operated to except the lands from that grant. We may therefore confine our attention to the grant under the act of July, 1864, and the subsequent proceedings which relate to that grant.

At the time of the passage of that act the United States owned the land in question as public land, and as to that land it had, as specified in the third section thereof, "full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights," and no portion of this land had at that time been "granted, sold, reserved occupied by homestead settlers, or preëmpted, or otherwise disposed of." On the 26th of March, 1884, the plaintiff had filed its map of definite location in the office of the Commissioner of the General Land Office, which map embraced the land in controversy.

The filing of such a map of definite location of a railroad determines the right of the railroad company to the land under the land grant acts of Congress. *Kansas Pacific Railway Company* v. *Dunmeyer*, 113 U. S. 629; *Sioux City &c. Company* v. *Griffey*, 143 U. S. 32, a grant similar in its nature to the one under consideration.

If there had been a preëmption claim at the time of the passage of the act of 1864, the land would not have passed under that grant. *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535.

Opinion of the Court.

It is contended that at the time (March 26, 1884) when the map of definite location was filed, the declaratory statement of Flett, filed in the local land office in 1869, remained there as a record, and was an assertion of a preëmption claim, and the defendant maintains that under the case of *Whitney* v. *Taylor*, 158 U. S. 85, the land described in that declaratory statement was excepted from the grant to the railroad company, and that the company therefore never acquired title to the land by filing its map of definite location under the grant contained in the act of 1864.

The learned judge, in delivering the opinion of the Circuit Court of Appeals in the case at bar, quoted the following language from the opinion of this court in *Whitney* v. *Taylor*, 158 U. S. 85, 92.

"That when on the records of the local land office there is an existing claim on the part of an individual under the homestead or preëmption law, which has been recognized by the officers of the government and has not been cancelled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the Government at its own suggestion or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim; it was enough that the claim existed, and the question of its validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard."

The Circuit Judge then stated that the controlling fact in this case was "that at the time of the definite location of the plaintiff's road, opposite which the land in controversy is situated, there was on the record of the local land office Flett's declaratory statement which had not been altered, amended, cancelled or set aside; and that fact operated to except the land in respect to which the claim existed from the grant to the railroad company."

The single question in this case is, therefore, whether the proceedings in the case of Flett were of such a nature as to prevent the grant to the company under the act of 1864 from taking effect at the time of the filing of its map of definite location, March 26, 1884.

The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein he assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution did not have that effect. It was not an amendment to the third section of the act of 1864 which granted the lands. If at that time (1870) certain claims had been filed against this land by reason of which it was excepted from the grant of 1870, such fact has no bearing upon the provisions of the act of 1864, at which time there was no claim upon this land, and if none existed when the map of definite location was filed in 1884, the grant included the land. The assertion that when the grant of 1864 was made there was a preëmption claim in existence is not borne out in law or fact by asserting the existence of such a claim when the grant of 1870 was made, and that by operation of that resolution the grant of 1864 was so amended as to exclude that land. It was not excluded. The fact that no claim existed at the time the act of 1864 was passed remained notwithstanding the adoption of the resolution of 1870, and the question therefore still recurs whether in 1884, when the map of definite location was filed, there was any claim upon this land which excepted it from the grant by virtue of the act of 1864.

It is well to examine the statutes relating to the right of preëmption under which the declaratory statement of Flett was filed in order to determine the rights, if any, which he had at the time when the company's map of definite location was filed.

That statement, filed by Flett in 1869, was to the effect that he intended to purchase the land which he described, "under the laws of the United States, authorizing the preëmption of unoffered lands." By the term "unoffered lands" is meant those public lands of the United States which have not been

offered at public sale. By section 3, chapter 51, of the act of Congress making further provision for the sale of public lands, approved April 24, 1820, c. 51, 3 Stat. 566, the price for which public lands should be offered for sale after the first day of July, 1820, was fixed at $1.25 an acre, and it was provided that at every public sale the highest bidder, who should make payment as prescribed, should be the purchaser, but no land was permitted to be sold at either public or private sale for a less price than $1.25 an acre; and it was further provided in that section that "All the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry as aforesaid; with the exception," etc.

After the passage of this act the public lands came to be spoken of as "unoffered lands," or those which had not been exposed to public sale, and "offered lands," or those which had been so exposed and remained unsold, and under the statute regulating the sales of public lands it would seem that unoffered land could not be purchased at any price or in any manner in advance of the public sale, while offered land was at all times subject to purchase by the first applicant at a fixed price. *Johnson* v. *Towsley*, 13 Wall. 72, 88.

By the act approved September 4, 1841, c. 16, entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant preëmption rights," 5 Stat. 453, there was granted, by the tenth section thereof, to every person being the head of a family, etc., "who since the first day of June, A.D. eighteen hundred and forty, has made or who shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office

for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions," etc.

By this section it will be seen that the right of preëmption was extended equally to unoffered and offered lands.

By section 14 it was provided, however, that the selection of unoffered lands should not delay the sale of such lands beyond the time which might be appointed by the proclamation of the President, nor should the provisions of the act be available to any person who should fail to make the proof and payment and file the affidavits required, under section 13 of the same act, before the day appointed for the commencement of the sales.

In regard to the so-called offered lands, it was provided by section 15 of the act as follows:

"SEC. 15. *And be it further enacted*, That whenever any person has settled or shall settle and improve a tract of land, subject at the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within three months after the passage of the same, and in the last within thirty days next after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

The result of the passage of this act was to grant the right to preëmpt 160 acres of either offered or unoffered land, and

that as to the unoffered lands the filing of a preëmption declaratory statement was not required, and the right of the preemptor to make due proof and payment remained until the time fixed by the proclamation of the President for the public sale of lands, at which time (if the proper proof and payment had not been made) the lands might be offered and sold to the highest bidder, and if not sold they would become subject to private entry by the first applicant at the minimum price. As to the offered lands, the right of the preëmptor was dependent upon his filing a declaratory statement in the local office, as stated in section 15 of the act above quoted.

By the fifth section of the act approved March 3, 1843, c. 86, 5 Stat. 619, it was provided that settlers under the preemption act of 1841, upon unoffered land, should "make known their claims, in writing, to the register of the proper land office, within three months from the date of this act when the settlement has already been made, and within three months from the time of the settlement when such settlement shall hereafter be made, giving the designation of the tract and the time of settlement; otherwise his claim to be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice and otherwise complied with the conditions of the law."

Taking these two acts of 1841 and 1843 and reading them together, it is seen that there was a difference between unoffered and offered lands by reason of the fact that on unoffered lands the right or privilege to secure land by a preëmption filing continued up to the commencement of the public sale whenever that might be, and if that right or privilege had not been exercised and the land was offered at public sale and not sold, it then became subject to private entry by the first applicant, while on offered lands the right or privilege to secure them by a preëmption filing continued for twelve months after the date of the settlement, and if the preëmptor failed to file the declaratory statement or make the proper affidavit within the twelve months, "the tract of land so settled and improved shall be subject to the entry of any other purchaser."

Congress by an act approved May 20, 1862, c. 75, 12 Stat. 392, provided for the sale of public lands for homesteads, and since that time the practice of disposing of the public lands at public sale has gradually been abandoned, although the authority remained. The abandonment of these public sales resulted in giving to those who had made preëmption filings upon unoffered land an uncertain time within which to prove or complete their proof and payment, because their time lasted until the day of the public sale proclaimed by the President. As these public sales were abandoned, the result was that these claimants were not under any obligation to make proof and payment at all.

By the second section of the act approved July 14, 1870, c. 272, 16 Stat. 279, it was provided that "all claimants of preëmption rights shall hereafter, when no shorter period of time is now prescribed by law, make the proper proof and payment for the lands claimed, within eighteen months after the date prescribed for filing their declaratory notices shall have expired: *Provided*, That where said date shall have elapsed before the passage of this act, said preëmptors shall have one year after the passage hereof in which to make such proof and payment."

That act was amended by resolution No. 52, approved March 3, 1871, 16 Stat. 601, by which twelve months in addition to that provided in the act were given to claimants to make proof and payment. Adding the twelve months given by this resolution to the eighteen months given by the act of 1870, all claimants of preëmption rights were given thirty months to make the proper proof and payment for the lands claimed.

These various provisions are found in the United States Revised Statutes from section 2257 to and including section 2267, the latter section giving the thirty months as stated.

We thus find that since 1871 all claimants of preëmption rights lost those rights by operation of law, unless within thirty months after the date prescribed for filing their declaratory notices they made proper proof and payment for the lands claimed. The filing of their declaratory statement,

and the record made in pursuance of that filing became without legal value if within the time prescribed by the statute proper proof and payment were not made. Whether such proof and payment were made would be matter of record, and if they were not so made the original claim was cancelled by operation of law, and required no cancellation on the records of the land office to carry the forfeiture into effect. The law forfeited the right and cancelled the entry just as effectually as if the fact were evidenced by an entry upon the record. The mere entry would not cause the forfeiture or cancellation. It is the provision of law which makes the forfeiture, and the entries on the record are a mere acknowledgment of the law, and have in and of themselves, if not authorized by the law, no effect. The law does not provide for such a cancellation before it is to take effect. The expiration of time is a most effective cancellation.

In such a case as this, where the forfeiture occurs by the expiration of the thirty months within which to make proof and payment, the record shows that the claim has expired; that it no longer exists for any purpose, and therefore it cannot be necessary in order that the law shall have its full operation that an acknowledgment of the fact should be made by an officer in the land office. The law is not thus subject to the act or the omission to act of that officer.

The case of *Whitney* v. *Taylor*, 158 U. S. 85, cited in the opinion of the Circuit Court of Appeals as decisive of the case at bar, we think has not the effect given to it by the learned court below. The land in that case was within the granted limits of the grant to the Central Pacific Railroad Company by the act of July 1, 1862, c. 120, 12 Stat. 489. That company filed its map of definite location March 26, 1864. It was held that the tract being subject to the preëmption claim of one J., at the time when the grant to the railroad company took effect, was excepted from the operation of that grant. It was subject to the claim of J. because in May, 1857, he had filed his statement, paid the fees required by law, and the filing was duly entered in the proper government record; and at that time, as has been seen by the above review of the stat-

utes, there was no period within which a preëmptor was compelled to prove up and pay for his claim, except that it should be done before the land was offered at public sale by the proclamation of the President. The tract in dispute had not been so offered at the date of the definite location of the road, and it was held that J.'s time to make proof and payment had not expired at the time of the filing of the map of definite location, and that consequently his was an existing claim of record at that date.

The citation from the opinion of the court in *Whitney* v. *Taylor* shows that the statement was made with reference to that important and material fact; that it was an existing claim on the part of the claimant at the time of the filing of the map of definite location. Whether that claim were an enforceable one or whether there were facts which when brought to the attention of the Government might induce it to cancel it, or the fact that the Government might at its own suggestion cancel the claim, were held not to affect the question. The material fact that it was an existing claim was the fact upon which the case was decided.

In this case, such fact does not exist. There was no existing claim at the time of the filing of the map of definite location by the plaintiff herein. It had expired and become wholly invalid by operation of law. The thirty months had expired years before the filing of this map.

In *Northern Pacific Railroad Company* v. *Colburn*, 164 U. S. 383, 388, it was stated in the course of the opinion that there were "other questions in this case, such as the significance of an *expired filing*," which were not considered by the Supreme Court of the State or noticed by counsel, and which were left for consideration thereafter. This shows that the case of *Whitney* v. *Taylor* was not regarded by the court, or by the justice who wrote the opinion therein, as having a controlling bearing upon the question as to the effect of an expired filing under circumstances such as are developed in this case.

If claims which were of such a nature as to be described as "existing" were made in regard to any of the lands which

otherwise might be included in the grant to the railroad company, we reiterate what was said in the *Dunmeyer case*, that it is not conceivable that Congress intended to place those parties, the railroad company and the various claimants to the land, in the attitude of contestants, with the right in each to require proof from the other of complete performance of its obligations. On the contrary, we would say that if there were at the time of the filing of the map of definite location an actual existing claim, even though it might turn out to be wholly unfounded, the land thus claimed would not pass by the grant. This has been decided as lately as *Northern Pacific Railroad Company* v. *Sanders*, 166 U. S. 620. In the case under consideration there was, at the time of the filing of the map of definite location, no claim within the meaning of the statute.

The right of Flett, obtained by the filing of his statement, was the right of preëmption only. In other words, the right of purchase before any other person, and by the law of Congress that right ceased at the expiration of thirty months from the filing of that statement. Thereafter there was no claim, for it had ceased and determined, and with reference to the right it was of no more validity after the expiration of that time than if the statement had never been filed. After the filing of a statement and while the time is running within which to make proof, there is an inchoate right on the part of the preëmptor which the Government recognizes, as in *Frisbie* v. *Whitney*, 9 Wall. 187.

It was held in *Johnson* v. *Towsley*, 13 Wall. 72, 90, that in case the preëmptor failed to file his declaration of intention within three months from the time of settlement, as provided for in the fifth section of the act of 1843, c. 86, 5 Stat. 619, 620, he nevertheless would have the right after the expiration of the three months, being in possession, to then make and file his declaration, provided no other party had made a settlement or had given notice of his intention to make one and no one would be injured by the delay. But the case is far from holding that after the declaration has been filed and the time in which to prove up and make pay-

ment upon his claim has wholly expired, the claim nevertheless still exists in sufficient force to prevent the transfer of title to the company under the act of Congress, simply because the officer of the land office has failed to perform a mere ministerial duty by cancelling of record a claim which has really ceased to exist by operation of law. A claim is not an existing one where by the record it appears that the right to make proof and payment has expired under the terms of the statute.

It appears that it has not been the practice of the Interior Department to enter any formal cancellation of an expired preëmption filing upon the books of the office; its practice has been to take no action concerning them. They have simply been treated as abandoned claims. *State of Alabama*, 3 L. D. 315, 317.

Reference is made in the briefs to the circular of Commissioner Drummond, dated September 8, 1873, in which he says:

"By the operation of law limiting the period within which proof and payment must be made in preëmption cases, such claims are constantly expiring, the settler not appearing within such time to consummate his entry. These expired filings are classed with those actually abandoned or relinquished."

And again in the circular of November 8, 1879, the Commissioner said:

"Where application is made by a railroad company to select lands on which preëmption filings have heretofore been made and cancelled, or where the same have expired by limitation of law, no other claim or entry appearing of record, you will admit the selections, in accordance with the rules governing in the premises herein communicated. No proofs by the companies concerning such claims will hereafter be required."

The effect given by the land department to what is termed an "expired filing" of the nature of the one in suit has not been uniform. It was in substance held in some cases that such expired filing amounted to a claim within the meaning

of the statute, and that the land did not pass under the grant to the railroad company. *Emmerson* v. *Central Pacific Railroad Company*, 3 L. D. 117; same case on motion for a rehearing, 3 L. D. 271; *Schetka* v. *Northern Pacific Railroad Company*, 5 L. D. 473; *Allen* v. *Northern Pacific Railroad Company*, 6 L. D. 520; *Fish* v. *Northern Pacific Railroad Company*, 21 L. D. 165; same case on motion for a rehearing, 23 L. D. 15. On the other hand, we have been referred to the cases of *Northern Pacific Railroad Company* v. *Stovenour*, 10 L. D. 645; *Meister* v. *St. Paul &c. Railroad Company*, 14 L. D. 624; *Union Pacific Railroad Company* v. *Hartwich*, 26 L. D. 680; *Wight* v. *Central Pacific Railroad Company*, 27 L. D. 182; *Central Pacific Railroad Company* v. *Hunsaker*, 27 L. D. 297. The last two cases cited touch the question very remotely, if at all.

The latest decision of the land office to which our attention has been called is that of *Union Pacific Railroad Company* v. *Fisher*, decided February 1, 1889. 28 L. D. 75. In that case the Secretary refers to the cases which have been cited above, holding that an expired filing excepted the land from a grant to the railroad company, and he gives his reasons for the decisions of the department in those cases, which he thinks render them not altogether in conflict with the other decisions of the department.

Although these decisions are somewhat inharmonious, it would seem that the practice of the department not to enter as cancelled an expired filing has been uniform, and the record has been left to speak for itself.

For the reasons which we have already given, we think it was unnecessary to enter the cancellation on the record of the office in order to permit the law of Congress to have its legal effect. That effect should not be dependent upon the action or non-action of any officer of the land department. When no proof and no payment have been made within the time provided for by the law, the record will show that fact, and that the right of the claimant has expired and the claim itself has ceased to exist.

A case of this kind, which simply necessitates a reference

to the record to ascertain whether the filing had expired and with it the rights of the claimant, differs from the case where a filing may have become subject to cancellation; but the record does not show it, and the right to cancel depends upon evidence to be found *dehors* the record. In such case, while the facts might invalidate the claim, yet as they are not of record and require to be ascertained, the claim itself, though possibly not enforceable, is still an existing claim within the meaning of the law, and it would remain such until cancellation had taken place or some other act done legally terminating the existence of the claim.

Upon the facts as found in this case, it seems to us that there was no claim against the land at the time of the passage of the act of 1864, and that years before the time of the filing of the map of definite location in 1884 the claim that once existed (in 1869) in favor of Flett had ceased to exist in fact and in law, and the title to the land passed to the railroad company by virtue of the grant contained in the act of 1864 and by reason of the filing of its map of definite location March 26, 1884. When, therefore, the defendant settled upon the land in April, 1886, and applied to make homestead entry thereon, his application was rightfully rejected for the reason that title to the land had passed to the railroad company, as above mentioned, and therefore he was not entitled to make the entry.

For the same reason, when John Flett, in September, 1887, submitted proof in support of his preëmption claim, founded upon his declaratory statement filed April 9, 1869, (and which claim he had abandoned since 1870,) he was too late. His right had expired many years before 1884, at which time the right to the land passed to the company, and he had no right to prove up on his abandoned and expired claim.

The record shows that at the time of the commencement of this action the railroad company was the owner and entitled to the immediate possession of the land in controversy, and that it was entitled therefore to judgment in its favor, and the courts below erred in dismissing its complaint.

Syllabus.

*The judgment of the United States Circuit Court of Appeals for the Ninth Circuit is reversed, and the case remanded to the Circuit Court for the Western Division, District of Washington, for further proceedings not inconsistent with the opinion of this court.*

MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA dissented.